Abu Bakar bin Jaafar & Anor v Malayan Banking Bhd

HIGH COURT (PENANG) — ORIGINATING MOTION NO 25-69-90
MOHAMED DZAIDDIN J
30 NOVEMBER 1990

Bankruptcy — Relation back, doctrine of — Protection of transactions from effect of doctrine — Notice of any available act of bankruptcy before payment made — Whether bank justified in freezing accounts when it had notice — Bankruptcy Act 1967, ss 47(1), (2), 54(1)(b) & (3)

The plaintiffs seek a declaration that the defendant is not entitled to freeze their accounts maintained in the defendant bank and for loss and damage as a result of the defendant's action and costs. A default judgment had been entered by another bank against the plaintiffs and subsequently that bank issued a bankruptcy notice against both plaintiffs by way of substituted service through an advertisement in a newspaper. The defendant bank became aware of this advertisement and they informed the plaintiffs that their respective accounts have been frozen until further notice. The defendant purportedly acted under s 47(2) of the Bankruptcy Act 1967 and it argued that the protection of bona fide transactions against the effect of 'relation back' afforded by s 54(1)(b) does not apply to it as it had notice of the bankruptcy notice issued by the other bank. It was therefore justified in freezing the plaintiffs' accounts.

Held, dismissing the motion:

The defendant was justified in its action in freezing the plaintiffs' accounts because it has knowledge of the issuance of the bankruptcy notice against the plaintiffs. Under s 54(3), 'notice' includes knowledge of an act of bankruptcy or of any bankruptcy proceedings or of facts sufficient to indicate to the person dealing with the debtor the commission of an act of bankruptcy, and a debtor commits an 'act of bankruptcy' if a bankruptcy notice requiring him to pay the judgment debt has been served on him (s 3(1)(i)). It follows that if the defendant was to make any payment to the plaintiffs under s 54(1)(b) knowing full well of the bankruptcy notice issued against the plaintiffs, it cannot subsequently say that this was a bona fide transaction under s 54(1). Upon the plaintiffs being adjudged bankrupt the doctrine of 'relation back' under s 47(1) would apply to the defendant.

[Bahasa Malaysia summary

Plaintif memohon suatu deklarasi bahawa defendan tidak berhak membekukan akaun-akaun mereka yang disimpan dalam bank defendan dan bagi kerugian dan gantirosak akibat perbuatan defendan dan kos. Suatu penghakiman ingkar telah dimasukkan oleh sebuah bank yang lain terhadap plaintif dan kemudiannya bank itu mengeluarkan notis kebankrapan terhadap kedua-dua plaintif secara penyampaian ganti melalui suatu pengiklanan dalam satu suratkhabar. Bank defendan sedar tentang pengiklanan tersebut dan mereka memberitahu plaintif-plaintif bahawa akaun-akaun masing-masing telah dibekukan sehingga notis selanjutnya. Defendan kononnya bertindak di bawah s 47(2) Akta Kebankrapan 1967 dan ia berhujah bahawa perlindungan transaksi bona fide terhadap kesan 'hubungan kembali' yang diberi oleh s 54(1)(b) tidak terpakai kepadanya kerana ia mempunyai notis (pengetahuan) tentang notis kebankrapan yang dikeluarkan oleh bank yang lain itu. Oleh itu, ia adalah wajar dalam membekukan akaun-akaun plaintif-plaintif.

Diputuskan, menolak usul itu:

Defendan adalah wajar dalam tindakannya dengan membekukan akaun-akaun plaintif-plaintif kerana ia mempunyai pengetahuan tentang pengeluaran notis kebankrapan terhadap plaintif-plaintif. Di bawah s 54(3) 'notis' termasuk pengetahuan mengenai suatu perbuatan kebankrapan atau sebarang prosiding kebankrapan atau mengenai fakta-fakta yang mencukupi bagi menunjukkan kepada orang yang berurusan dengan penghutang, perbuatan kebankrapan itu, dan seseorang penghutang melakukan 'perbuatan kebankrapan' sekiranya satu notis kebankrapan menghendakinya membayar hutang penghakiman diserahkan kepadanya (s 3(1)(i)). Berikutan dengan itu, sekiranya defendan membuat sebarang bayaran kepada plaintif-plaintif di bawah s 54(1)(b) dengan pengetahuan sepenuh mengenai notis kebankrapan yang dikeluarkan kepada plaintif, ia tidaklah boleh terkemudiannya berkata bahawa ini adalah transaksi bona fide di bawah s 54(1). Sebaik sahaja plaintif-plaintif diperintah bankrap, doktrin 'hubungan kembali' di bawah s 47(1) akan terpakai kepada defendan.]

Legislation referred to

Bankruptcy Act 1967 ss 47(1), (2), 54(1)(b), (3)

Teja Singh Peneser for the plaintiffs.
Chew Sien Chee for the defendant.

Cur Adv Vult

Mohamed Dzaiddin J: By this notice of originating motion the plaintiffs seek a declaration that the defendant is not entitled to freeze their accounts maintained in the defendant bank and for loss and damage as a result of the defendant's action and costs.

The brief facts of the matter are these. Both plaintiffs are customers of the defendant at its Bayan Baru branch. The first plaintiff maintains a personal account, whilst the second plaintiff has a fixed deposit account with the defendant. Sometime in April 1987, another bank ie United Asian Bank Bhd sued Pen Trading Co and both plaintiffs, being partners of the said firm, for recovery of money owed by the firm under the letter of hypothecation dated 11 March 1981. The service of the summons against them was effected by substituted service in *The Star* newspaper dated 15 October 1987. Despite the advertisement, the plaintiffs did not enter appearance or defence and, as a result, the United Asian Bank Bhd obtained a default judgment against them in the sum of $25,085.71 with interest and costs. Subsequently, the United Asian Bank Bhd issued bankruptcy notice vide Bankruptcy No 29-2146-89 against both plaintiffs, also by way of substituted service in *The Star* dated 10 September 1990. In the meantime, the defendant bank became aware of this advertisement and by letter dated 21 September 1990, the defendant informed the plaintiffs that their respective accounts have been frozen until further notice. On enquiries made by the plaintiffs, the defendant informed them that the bank acted under s 47(2) of the Bankruptcy Act 1967 ('the Act'). This subsection reads as follows:

No bankruptcy petition, receiving order adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning credit.

The crucial issue in this application is whether or not the defendant bank is justified in freezing the accounts of the plaintiffs soon after it had notice of the bankruptcy notice appearing in *The Star* on 10 September 1990.

Encik Chew, for the defendant, submitted that it was justified for the bank to freeze both accounts because being aware of the bankruptcy notice having been issued against the plaintiffs, the doctrine of 'relation back' under s 47 would apply against the bank and it could not later avail itself of the protection provided under s 54(1)(b) of the Act. In short, it meant that under s 47(1) the bankruptcy of a debtor related back to and commenced at the time of the act of bankruptcy being committed. Encik Teja, for the plaintiffs, on the other hand, submitted that s 47 would only apply after the making of the adjudication order and until such time, the plaintiffs are entitled to deal freely with their money in their respective accounts.

As has been seen, under s 47(1) of the Act, the bankruptcy of a debtor shall be deemed to have 'relation back' to and commence at the time of the act of bankruptcy being committed on which a receiving order is made against the bankrupt. Hence, the property of the bankrupt shall vest in the official assignee only upon the making of the adjudication order. However, the title of the the official assignee, under the doctrine of 'relation back', is related back from the date of adjudication to the commencement of the bankruptcy. See: Catherine Tay Swee Kian — *Bankruptcy, The Law and Practice*, at p 56. Therefore, any dealings by or with the bankrupt after the commencement of the bankruptcy is prima facie invalid and can subsequently be set aside by the official assignee. However, under s 54(1) of the Act, certain transactions entered into by the bankrupt are protected from the operation of the doctrine of 'relation back'. Section 54(1) reads as follows:

Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate in the case of a bankruptcy —

(a) any payment by the bankrupt to any of his creditors;
(b) any payment or delivery to the bankrupt;
(c) any conveyance or assignment by the bankrupt for valuable consideration;
(d) any contract, dealing or transaction by or with the bankrupt for valuable consideration:

if —

(i) the payment, delivery, conveyance, assignment, contract, dealing or transaction, as the case may be, takes place before the date of the receiving order; and

(ii) the person other than the debtor to by, or with whom the payment, delivery, conveyance, assignment, contract, dealing or transaction was made, executed or entered into has not at the time of the payment, delivery, conveyance, assignment, contract, dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.

The effect of s 54(1) is that transactions under (a) to (d) are protected and their validity are not affected by the doctrine provided that such transactions take place before the date of the receiving order and the person other than the debtor by whom the payment was made has not, at the time of the payment, notice of any available act of bankruptcy committed by the bankrupt before that time. This is the crux of the matter. The defendant believes that because it has notice of the bankruptcy notice having been issued by United Asian Bank Bhd against the plaintiffs as advertised in *The Star*, it cannot, therefore, claim protection under the proviso to s 54(1) of the Act.

After hearing the submissions of counsel and on a proper reading of s 54 of the Act, in my opinion, the defendant was justified in its action in freezing the plaintiffs' accounts because it has knowledge of the issuance of the bankruptcy notice against the plaintiffs. Unlike s 54 of the Singapore Bankruptcy Act (Cap 20, 1985 Ed) and the English Bankruptcy Act 1914, our s 54(3) goes further to state that for the purpose of the section, 'notice' includes knowledge of an act of bankruptcy or of any bankruptcy proceedings or of facts sufficient to indicate to the person dealing with the debtor the commission of an act of bankruptcy, and a debtor commits an 'act of bankruptcy' if a bankruptcy notice requiring him to pay the judgment debt has been served on him (s 3(1)(i)). It follows, therefore, if the defendant was to make any payment to the plaintiffs under s 54(1)(b) knowing full well of the bankruptcy notice issued against the plaintiffs, it cannot subsequently say that this was a bona fide transaction under s 54(1). In the result, upon the plaintiffs being adjudged bankrupt, the doctrine of 'relation back' under s 47(1) would apply to the defendant. In conclusion, I ought to mention here that in view of the clear definition of 'notice' in sub-s (3), any consideration of the English authorities on the matter will be irrelevant.

For the above reasons, I dismiss the plaintiffs' application.

Application dismissed.

Solicitors: *Teja Singh Peneser & Co; Wong-Chooi & Mohd Nor.*

Reported by *Zarinah Marican*